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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. ANDRE DURHAM BELL, Defendant and Respondent.	E063018 (Super.Ct.Nos. RIF1205134 & RIF1300396) OPINION

APPEAL from the Superior Court of Riverside County. Becky Lynn Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, Emily R. Hanks and Natalie M. Lough, Deputy District Attorneys for Plaintiff and Appellant.

Steven L. Harmon, Public Defender and Laura B. Arnold, Deputy Public Defender, for Defendant and Respondent.

In 2013, defendant Andre Bell pled guilty to non-serious felony theft-related offenses and admitted a Strike allegation, in two cases, in return for an aggregate state prison term of five years, four months. Following enactment of Proposition 47,

defendant sought resentencing pursuant to Penal Code section 1170.18.[1] The trial court granted defendant's petition, reduced the felony convictions to misdemeanors, and resentenced him to time served. The People appealed.

On appeal, the People argue that defendant was ineligible for resentencing under section 1170.18 in both cases because (1) he pled guilty pursuant to a sentence bargain in which he expressly agreed to a prison term; (2) he failed to meet his burden of demonstrating eligibility for relief under section 1170.18 in both cases because the amounts involved exceeded $950; and (3) the People are entitled to reinstatement of dismissed counts. We affirm.

BACKGROUND

Proceedings Leading to Guilty Plea in Case No. RIF1205134:

On December 28, 2012, a complaint was filed in case No. RIF1205134, alleging two counts of receiving stolen property (credit cards), involving separate victims. (§ 496, subd. (a), counts 1, 2.) The complaint further alleged defendant had been convicted and sentenced to prison in two separate cases (prison priors), within the meaning of section 667.5, subdivision (b), and that he had been convicted of a serious or violent felony within the meaning of the Strikes law. (§§ 667, subds. (c) & (e), 1170.12, subd. (c)(1).)

On January 9, 2013, pursuant to a plea agreement, defendant pled guilty to one count of receiving stolen property, one count of petty theft with a prior (§§ 666, 484, count three, added by amendment for purposes of the plea bargain), and admitted the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Strike allegation, in return for a stipulated sentence of four years in prison (the middle term of two years, doubled under the Strike law). The agreement also included a waiver pursuant to the holding of *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*), allowing the court to assess restitution including losses relating to dismissed counts.

Proceedings Leading to Guilty Plea in Case No. RIF1300396:

On January 9, 2013, a four-count complaint was filed, alleging commercial burglary (§ 459, second degree, count 1), grand theft (§ 487, subd. (a), count 2), and two counts of petty theft with a prior theft-related conviction (§§ 666, 484, subd. (a), counts 3 & 4). The complaint also alleged defendant had suffered four prison priors, within the meaning of section 667.5, subdivision (b), and one Strike, within the meaning of sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1).

On January 18, 2013, pursuant to a plea agreement, defendant pled guilty to count one, commercial burglary, and admitted the Strike prior, in return for a stipulated term of 16 months (one-third the middle term of two years, doubled), which would run consecutive to the term imposed in case No. RIF120534. The agreement also included a waiver pursuant to the holding of *Harvey, supra,* 25 Cal.3d 754, allowing the court to assess restitution including losses relating to dismissed counts.

Sentencing on Both Cases

On the same date that he entered his guilty plea in case No. RIF1300396, the court sentenced defendant on case No. RIF1205134. The court denied probation and committed defendant to state prison for four years on count one (receiving stolen property), with a concurrent four year term for count three (petty theft with a prior). On

motion by the People pursuant to the plea agreement, the court dismissed count two and struck two of the prison priors.

On February 7, 2013, defendant was sentenced on case No. RIF1300396. The court imposed one-third the middle term for count one (eight months, commercial burglary), which was doubled based on the Strike, for a total of 16 months, and ordered to run consecutive to the term imposed on case No. RIF1205134. On motion by the People pursuant to the plea agreement, the court dismissed counts two through four, and the four prison priors.

Resentencing Pursuant to Proposition 47:

On November 4, 2014, the electorate passed Proposition 47, the Safe Neighborhoods and Schools Act, which reclassified commercial burglary (§ 459), receiving stolen property (§ 496), and petty theft with a prior (§ 666) as misdemeanors. The act went into effect the next day. (Cal. Const., art. II, § 10.) After the effective date, grand theft involving property that does not exceed $950 is petty theft, unless the defendant has prior convictions for offenses specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667, or for an offense requiring registration pursuant to section 290. (§ 490.2, subd. (a).) Receiving stolen property is a misdemeanor if the value of the stolen property does not exceed $950. (§ 496, subd. (a).)

On November 20, 2014, defendant wrote a letter to the court inquiring into the applicability of Proposition 47 to his cases. The People filed separate pleadings opposing resentencing in each of defendant's two cases. On February 6, 2015, the court vacated

the sentences imposed, reduced the offenses to misdemeanors, and imposed jail terms in both cases, which were deemed served.

On March 2, 2015, the People appealed the orders resentencing defendant on both cases.

DISCUSSION

a. *Statutory Backdrop*

We begin our analysis with the statutory language.

Proposition 47 created a new sentencing provision in section 1170.18. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092 (*Rivera*).) In pertinent part, subdivision (a) of section 1170.18 provides that "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a); *Rivera, supra*, at p. 1092.)

Proposition 47 was intended to reduce penalties for certain non-serious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors. (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652 (*T.W.*).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be resentenced to a misdemeanor, unless the court, in its discretion, determines that resentencing the

petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) The statute expressly applies to convictions by plea as well as by trial. (§ 1170.18, subd. (a).)

In interpreting a voter initiative like Proposition 47, we apply the same principles that govern statutory construction. (*Rivera, supra,* 233 Cal.App.4th at p. 1099.) ""The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]"" (*Id*., at p. 1099, quoting *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) To construe a voter initiative, the voters' intent governs. (*Rivera, supra,* at pp. 1099-1100, citing *People v. Jones* (1993) 5 Cal.4th 1142, 1146.)

To determine voters' intent, we begin with the statutory language itself. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192-193.) We look first to the words the voters used, giving them their usual and ordinary meaning. (*Rivera, supra,* 233 Cal.App.4th at p. 1100.) Where the language of a statute is unambiguous, the plain meaning controls. (*People v. Leiva* (2013) 56 Cal.4th 498, 506.) Section 1170.18, subdivision (a) is unambiguous.

Here, the ballot pamphlet explained the purpose of the initiative was to save money, while insuring that people convicted of murder, rape, and child molestation would not benefit from the act. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), pp. 36-37, 70.) It was intended to allow offenders currently serving felony sentences for the specified offenses to apply to have their felony sentences reduced to misdemeanor sentences. (*T.W., supra,* 236 Cal.App.4th at p. 652.) The fiscal effects would be achieved by

reducing the state prison and county jail populations, as well as the attendant court, prosecution and defense costs for non-serious property offenses, allowing investments in programs that reduce crime and improve public safety. (Ballot Pamp., *supra*, pp. 37, 70.) We conclude that the intent of the voters was to effectuate this purpose.

b. *Filing a Section 1170.18 Petition Did Not Breach the Plea Agreement.*

The People argue that defendant pled guilty to a felony pursuant to a sentence bargain that expressly included a state prison term, and is therefore precluded from seeking to modify the agreed-upon terms of his plea. We disagree.

The language of the statute unambiguously applies to persons convicted of certain felonies, "whether by trial or plea." (§ 1170.18, subd. (a).) The statute authorizes an eligible defendant to seek resentencing, and does not authorize a defendant to challenge the guilty plea. A petition for resentencing after passage of Proposition 47 does not constitute a breach of a plea bargain.

Although plea agreements are contractual in nature and interpreted using principles of contract law (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1069), a plea agreement is "'deemed to incorporate and contemplate not only the existing law, but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy . . . .' [Citation.]" (*Gipson, supra,* 117 Cal.App.4th at p. 1070; *Doe v. Harris* (2013) 57 Cal.4th 64, 70.) "[T]he absence of any discussion during plea negotiations of the possibility of changes to the law does not translate into an

agreement the defendant will be unaffected by statutory amendments."[2] (*Doe v. Harris, supra,* 57 Cal.4th at p. 72.) In other words, defendant did not bargain to serve state prison terms for misdemeanor conduct.

It follows, therefore, also as a general rule, that requiring the parties' compliance with changes in the law made applicable to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to refer to the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in statutory consequences attending his or her conviction. (*Doe v. Harris, supra,* 57 Cal.4th at pp. 73-74; see also, *T.W, supra*, 236 Cal.App.4th at p. 653.)

The People argue that defendant is seeking to repudiate the plea bargain, and "jettison the unfavorable aspects of the plea agreement" in seeking resentencing. They argue that the decision in *Doe v. Harris, supra*, does not apply to express, bargained-for terms of the agreement, and that nothing in *Doe* changed the rule "that a party to a plea agreement cannot retain the favorable aspects of the negotiated disposition while jettisoning the unfavorable ones." Defendant did not repudiate the plea agreement because the agreement did not expressly agree that ameliorative statutory amendments would not apply to him.

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[2] It is not impossible that parties to a particular plea bargain might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to relevant law. (*People v. Smith* (2014) 227 Cal.App.4th 717, 728, citing *Doe v. Harris, supra,* 57 Cal.4th at p. 71.) However, prosecutorial or judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted as an implied promise the defendant will not be subject to the amended law. (*Smith, supra*, at p. 728.)

Additionally, defendant has not attempted to retain the benefits of the plea bargain while jettisoning the unfavorable aspects. The counts that were dismissed as part of the plea bargain also have been re-characterized by Proposition 47. Defendant simply sought resentencing as provided by the express terms of the statute. Defendant's petition for resentencing did not violate his plea bargain. This disposes of the alternative argument that defendant breached the plea agreement.

c. *Defendant Was Eligible for Relief Under Section 1170.18.*

The People argue that defendant failed to satisfy the burden of proving that he was eligible to have his offense of receiving stolen property reduced to a misdemeanor because in each case the value of the stolen property exceeded $950. We disagree.

The defendant has the initial burden of proving he or she is eligible for resentencing. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.) Here, there is no probation report to explain how the amount of restitution, the determinative factor, was calculated for both cases. However, at the original sentencing hearing on case No. RIF1300396, the People informed the court that the victim sought restitution in the amount of $850. The abstract of judgment for case No. RIF1300396 refers to direct restitution to victims in the amount of $850. Defendant's petition explained that in one case, the victim's loss was $550, whereas in the other case, the amount involved was $300, bringing the aggregate value of the property stolen in both cases to $850. On this record, defendant's offenses qualify for reduced punishment under Proposition 47.

Specifically relating to case No. RIF1300396, the People point to the language of the complaint, wherein it was alleged that the burglary and theft counts involved property

having a value of $950, as evidence that the offense did not qualify as a misdemeanor. But, allegations contained in a complaint are not evidence. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 96, fn. 2; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672.) "The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true." (CALCRIM No. 103.)

As to case No. RIF1205134, the People argue that the credit limit is the proper measure of the value of the stolen credit cards with which defendant was found in possession as the basis for the receiving stolen property count. However, the People never proffered evidence to prove those values. Instead, the People rely upon federal appellate decisions interpreting the federal sentencing guidelines. Under the federal guidelines, a defendant can be sentenced to a longer term by using the credit card limit as the "intended loss." (*United States v. Sowels* (5th Cir. 1993) 998 F.2d 249, 251-252.) The federal sentencing guidelines at issue in *Sowels*, as well as the other federal authorities cited by the People, expressly permit a district court to consider the "intended loss that a defendant was attempting to inflict" where that amount can be determined. (See *United States v. Egemonye* (1st Cir. 1995) 62 F.3d 425, 428.)

The federal guidelines do not apply to the determination of economic loss under California law. Instead, the trial court is governed by section 1202.4, subdivision (f), which does not authorize restitution for "intended loss." Section 1202.4, subdivision (f), requires restitution to victims who have suffered economic loss "in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." Here, at the original sentencing hearing, the People informed the

trial court that the amount of loss for both cases was $850, which the court ordered as direct victim restitution. This amount constitutes the amount of economic loss because no other evidence was presented to the court. In the absence of evidence to the contrary, the trial court properly considered section 1202.4, subdivision (f) in determining the amount of loss to be $850.

The defendant met his initial burden of showing that the value of the stolen property was less than $950, making him eligible for resentencing. At this point, the burden shifted to the People to present evidence to the contrary. (Evid. Code, § 110.) However, no evidence was presented. Defendant was eligible for relief.

d. *Reinstatement of Dismissed Charges is Not Required.*

The People's final argument is that if the defendant is entitled to relief from his felony convictions, the People have been deprived of the benefit of the plea bargain and the dismissed counts should be reinstated. We disagree.

As a general principle that when a guilty plea is invalidated, the parties are generally restored to the positions they occupied before the plea bargain was entered. (*People v. Aragon* (1992) 11 Cal.App.4th 749, 756-757.) Where legislation renders a judgment insupportable, undermining a plea bargain, we must fashion a remedy that restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled. (*People v. Collins* (1978) 21 Cal.3d 208, 216 (*Collins*).)

In *Collins,* the defendant pled guilty to a single felony count of nonforcible oral copulation in return for dismissal of 14 other counts alleging forcible sexual offenses and

other felonies. The defendant challenged the count to which he had pled guilty after the Legislature decriminalized consensual oral copulation. But in *Collins*, the felony character of the defendant's other offenses was not legislatively changed. Additionally, the legislation did not expressly authorize a defendant to seek resentencing. The reviewing court remanded to allow the prosecution to revive one or more of the dismissed counts while limiting defendant's potential sentence to that stipulated in the plea bargain. (*Collins, supra*, 21 Cal.3d at p. 216.)

In *In re Blessing* (1982) 129 Cal.App.3d 1026, the defendant pled guilty to two felony counts of assault on a peace officer and five counts of robbery, and admitted a gun use allegation, in return for dismissal of five additional counts of robbery with firearm use allegations and a stipulated sentence. However, the firearm enhancement was subsequently voided by the holding of *Harvey, supra,* 25 Cal.3d 754. The defendant sought relief from the unauthorized sentence by way of a habeas petition. On review, the trial court agreed it could not give effect to an enhancement unauthorized by law, but remanded the case to allow the People to withdraw from the plea agreement so the bargained for sentence could be achieved by some alternative calculation. (*In re Blessing, supra,* 129 Cal.App.3d at p. 1030.)

The California Supreme Court recently granted review to consider this precise question in the case of *Harris v. Superior Court* (2015) 242 Cal.App.4th 244 [review granted December 28, 2015, S231489]. There, the reviewing court relied on *Collins, supra,* 21 Cal.3d 208, 216, to hold that the People could reinstate dismissed counts because the plea agreement had been undermined by "external events and not defendant's

repudiation." The *Collins* court's concern was to "preclude vindictiveness and more generally to avoid penalizing a defendant for pursuing a successful appeal."[3] (*Collins, supra,* 21 Cal.3d at p. 216.)

We think the better approach is the one adopted by another panel of this Division in *People v. Gonzalez* (2016) 244 Cal.App.4th 1058, where we held that the People were not entitled to withdraw from the plea. There, we said, "Though it is true a party to a plea agreement cannot unilaterally alter its terms, changes in the law can do so." (*Id.,* at p. 1068.) We went on to explain that while the plea agreement did call for a felony sentence, it did not provide that defendant would not be permitted to benefit from future, retroactive statutory changes. (*Id.,* at pp. 1068-1069.) We therefore concluded the terms of the plea agreement did not preclude resentencing pursuant to section 1170.18. (*Gonzalez,* at pp. 1069-1069.)

Here, defendant did not seek to invalidate his plea, so the reasoning of authorities holding that parties must be restored to their status quo are inapplicable. Defendant simply sought resentencing for the offenses to which he pled, as the statute expressly provides.

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[3] The vindictiveness of which the court was concerned relates to the situation where charges are increased by amending the accusatory pleading following the defendant's exercise of a procedural right or appeal. (*Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.